Supreme Court U.S.
FILED
NOV 16 1904
JAMES H. MCKENNEY
CLERK

No. 63.

Supplemental Brief for Defendant (Appellee).

Term No. 19, 1904.

In the Supreme Court of the United States.

October Term, 1904.

Russell Harding, Receiver, &c., Appellant,

vs.

The United States, Appellee.

On motion to dismiss appeal and affirm decree of Court of Appeals for the Fifth Circuit.

Supplemental brief for the appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

RUDOLF HELWIG, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 65.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Bartlett v. *Kane* (16 How., 263) was decided in 1853 and related to transactions subsequent to the enactment of the tariff act of 1846 and the other act of that year (Feb. 11, 9 Stat., 3; now sec. 2948, R. S.), which forbade the distribution of additional duties as penalties to officers of the customs. The latter act was not mentioned in the opinion. The court says that in several acts additional duty has been distributed among customs officers as penalties. This is not strictly accurate, since it implies that such distribution had been recognized or authorized by statute, which is not the fact—a practice, merely, without express authority, having grown up. The court's statement, not referring to the act of February 11, 1846, seems to have been

made as a preliminary reason for assimilating additional duties to penalties as between the United States and the importer, in reference to drawback. But the court could have found little persuasiveness in this view if the act of February 11, 1846, had been in its mind.

The opinion shows clearly the real reason why additional duties, although not penalties, should not be recovered as drawback on reexportation. Regularity and carefulness as well as honesty and the absence of fraud should characterize the relations between importers and Government; and the effect of additional duties as checks would not be secured if importers could avoid the onerous results of their indifference or dishonesty by reexporting and claiming drawback.

The opinion says that return of "forfeitures or amercements" is not in the purview of the system of regulations providing for drawback. These two words aptly include the idea of a penalty where there is fraud, and of an extra duty exaction only where the undervaluation is not fraudulent.

As to the circuit court act of 1887, suggested in questions from the Bench, it was corrected, respecting certain formal errors, by the act of August 13, 1888 (sec. 1, 25 Stat., 433), and does not substantially differ from the act of 1875 (18 Stat., 470), or, indeed, from the original judiciary act of 1789 (sec. 11, 1 Stat., 78), so far as the present question is concerned. The variations in the development of this law affect jurisdictional amount, character of the parties, and removal

of causes from State courts, and not the point whether circuit courts have jurisdiction of penalties. The gist of the provisions applicable here is that circuit courts shall have original concurrent cognizance with State courts of civil suits involving the necessary amount arising under the Federal Constitution and laws, or in which the United States are plaintiffs; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States except as otherwise provided by law, and concurrent jurisdiction of crimes and offenses cognizable by the district courts.

United States v. *Mooney* (116 U. S., 104) construed the act of 1875 and positively decided that exclusive jurisdiction over suits for the recovery of penalties and forfeitures remained with the district courts notwithstanding the act of 1875. This decision was substantially affirmed in *Lees* v. *United States* (150 U. S., 476), although that case particularly related to a penalty imposed for an offense clearly penal (it would seem) under the immigration act of 1885.

Nor is it likely that the jurisdiction of the circuit courts may be thus enlarged on the view that they are given concurrent jurisdiction over *crimes and offenses* cognizable in the district courts. For while in one aspect an action to recover a penalty is criminal in its nature (as observed by the court in *Lees* v. *United States*), perhaps because of the nature of the act respecting which it is imposed, on a strict view of jurisdiction it seems clear that such suits are considered as civil

even when enforcing forfeiture. (*Ketland* v. *The Cassius*, 2 Dall., 365; *United States* v. *La Vengeance*, 3 Dall., 297; *The Sarah*, 8 Wheat., 391.) It does not seem possible, therefore, to bring such a suit under the jurisdiction of the circuit court as included in its concurrent competence to hear and determine crimes and offenses. A penalty may relate to an offense, but is not one, substantively, under the most liberal view. Speaking of a forfeiture, Justice Wilson says, in *Ketland* v. *The Cassius*, *ut supra:* "To take cognizance of a proceeding merely *in rem* can not be considered as taking cognizance of a crime or offense."

Many of the cases which regard suits for forfeitures or penalties as civil suits rest, it is true, upon the civil jurisdiction in admiralty; but this does not seem to be the only ground for the distinction. In the case of *Ketland* v. *The Cassius* the argument in favor of the circuit court's jurisdiction was that the case was not a civil case of maritime jurisdiction, but a proceeding to enforce a forfeiture for an offense, not included among seizures under laws of impost, navigation, or trade; and that an information to enforce a forfeiture fell under the circuit court's jurisdiction by section 11 of the act of 1789, giving "exclusive cognizance of all crimes and offenses." Mr. Rawle, then United States attorney, argued that such proceedings are civil suits, citing *Cowper*, 391, and *United States* v. *Le Vengeur* (unreported). At all events, it is in general unusual to proceed to recover penalties and forfeitures by indictment or information in a criminal action. Finally, the clear

implication of the fourth subdivision of section 629, Revised Statutes, is that a suit for a penalty and forfeiture is a suit at law or a civil cause.

As the same concurrent jurisdiction was conferred by the original judiciary act, the remark of the court in *Mooney* v. *United States* should doubtless be borne in mind, viz: "But it was never supposed that under the act of 1789 the provisions of section 11 interfered with the exclusive jurisdiction conferred on the district courts by section 9 of the same act."

Therefore for the following reasons it seems necessary to concede that if the additional duties here *are*, in fact, a penalty, the jurisdiction is in the district court:

1. Because that court is expressly given jurisdiction by section 563, which was originally held to be exclusive and still seems to be so regarded. (See the opinions in the Mooney and Lees cases.)

2. Because by the fourth subdivision of section 629 the grant of jurisdiction to the circuit court expressly excepts suits for penalties and forfeitures.

3. Because a suit for a penalty under the customs laws is not one of those expressly assigned to the circuit court as by subdivisions 5, 7, 15 of section 629.

4. Because the later jurisdictional acts, as construed by the case of *Mooney* v. *United States*, approved in *Lees* v. *United States*, do not seem to have changed the previous law on the point.

The court perceives that on this branch of the case, suggested from the Bench, the Government counsel

considers it his duty to submit the state of the law on the subject for the information of the court, rather than to insist, merely as an advocate, that in any event the jurisdiction sought by the United States is competent.

HENRY M. HOYT,
Assistant Attorney-General.

O